

# SCAFFOLDS

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## CONSTITUTION SECTIONS: QUICK REFERENCE

**s 7:** Senate directly chosen by the people

**s 24:** House of Reps directly chosen by the people

<b>SECTION 51</b>	<b><u>s 51 powers to be generally aware of</u></b>
<b>s 51(i):</b> Trade and commerce power	<b>s 51(v)</b> telecommunications power
<b>s 51(ii):</b> Taxation power	<b>s 51(vii)</b> lighthouses
<b>s 51(vi):</b> Defence power	<b>s 51(x)</b> fisheries
<b>s 51(xx):</b> Corporations power	<b>s 51(xi)</b> census and statistics;
<b>s 51(xxvi):</b> Race power	<b>s 51(xii)</b> currency
<b>s 51(xxix):</b> External affairs	<b>s 51(xiii)</b> banking
<b>s 51(xxx):</b> Compulsory acquisition of property	<b>s 51(xxi)</b> marriage
<b>s 51(xxxix):</b> Incidental power	<b>s 51(xxii)</b> divorce
	<b>s 51(xix)</b> aliens
	<b>s 51(xxvii)</b> immigration

**s 53:** Appropriations bills cannot originate or be amended in the Senate

**s 54:** 'No tacking' for budget and supply (appropriation) bills

**s 55:** 'No tacking' onto taxation bills

**s 56:** Purpose of appropriation must be recommended in same session

**s 61:** Executive power

**s68:** Command in chief vested in G-G, who acts on Minister's advice. Not a reserve power.

**s 81** Consolidated Revenue Fund

**s 83** Appropriation must be done by law

**s 89:** Braddon clause (75% of customs and excise revenue returned to states: now defunct).

**s 90** Exclusive power over customs, excise and bounties

**s 92:** Trade within the Commonwealth to be free.

**s 94** Distribution of surplus revenue to the states

**s 96** Financial assistance to the states

**s 109:** State laws invalid if inconsistent with Cth law

**s 114:** States may not raise or maintain any naval or military force or impose any tax on Commonwealth property. Commonwealth also will not tax State property.

**s 116:** Commonwealth not to legislate in respect of religion

**s117:** Immunity for interstate residents

**s 119:** Cth shall protect every State against invasion and, on the application of the State Govt, against domestic violence.

**s 122:** Cth can make laws for Government of territories

**s 128:** Referendum is needed to change constitution

### 3. EXTERNAL AFFAIRS POWER – s51(xxix)

s 51(xxix): external affairs  
s 61: executive power

#### A. GEOGRAPHIC EXTERNALITY

Mere geographic externality appears to be sufficient to validate an exercise of the s 51(xxix) power (**Polyukhovich**)

Deane J: any law which can properly be characterized as a law with **respect to any matter, thing or person occurring or situated outside Australia** is a law with respect to “external affairs” for the purposes of s 51(xxix)’.

However, High Court authority is inconclusive on whether a ‘nexus’ with Australia is required:

- Court in **Horta** said the Timor Sea floor had ‘an obvious and substantial nexus’ with Australia.
- Court in **Polyukhovich** said that Australia’s involvement in WWII meant the subject matter ‘touched and concerned’ Australia.
- While the majority in **XYZ** rejected a challenge to the established geographic externality principle, they did note that these decisions:

*‘may be supported on a narrower reading of s 51(xxix) than the [mere] requirement of a geographically external matter or thing’.*

Accordingly it’s **unclear whether a nexus with Australia is required** for a law to be supported by the geographic externality principle.

The NSW Court of Appeal in **Alqudsi** held that geographic externality applies to **intangible things** (intangible intent to support crimes overseas). **Alqudsi** also held that a **proportionality test** was not applicable, because external affairs is a subject matter power, and that mere **‘international concern’** was not a basis for the external affairs power.

This is not authority, but the HCA refused leave to appeal, saying the NSWCA was clearly correct.

#### EXTERNAL AFFAIRS

**Polyukhovich:** Laws to punish Australian who committed war crimes in Ukraine in WWII.

**Horta:** Timor Gap treaty invalid because it was contrary to international law (self-determination).

**XYZ:** Child sex tourism offences under Cth law, committed by Australian in Thailand.

**Tasmanian Dams:** Franklin Dam, Convention for protection of Cultural and Natural Heritage.

**Industrial Relations Act Case:** Supported by various ILO conventions & recommendations.

**Ex Parte Henry (No 2):** Aviation safety

**Pape:** Financial crisis stimulus payments.

#### B. TREATIES

Power to enter into a treaty is an executive power supported by s 61 of the Constitution.

##### 1. Treaty must be ‘bona fide’ or ‘genuine’ (**Tasmanian Dam Case**)

No cases have found treaties not to be bona fide. The Govt would need to go treaty shopping with the purpose of justifying municipal laws that otherwise have no head of power.

##### 2. Law must implement treaty in whole or in part (**Industrial Relations Act Case**)

Law must be capable of being reasonably considered as **appropriate and adapted** to achieving the implementation of the treaty.

*Such a law will not be capable of being so seen unless it appears that there is “reasonable proportionality” between that purpose or object and the means which the law adopts to pursue it.*

Partial implementation of treaties is sufficient to enable the external affairs power, but a law will be invalid **if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention**

##### 3. Law must implement treaty obligations that have a reasonable level of specificity (**Industrial Relations Act Case**)

Mere aspirations, which give no direction as to how they are to be fulfilled, cannot support a law under s 51(xxix).

##### EXCEPTION: **Ex Parte Henry (No 2)**

Domestic enactment of aviation safety convention was more onerous than required by the convention. Court held domestic regulations can differ to the treaty’s specific rules in certain circumstances. Consider:

- Restrictiveness of treaty rules (here the height restrictions were expressed as a minimum);
- Whether the additional prohibition could be considered incidental;
- Whether the additional prohibition is ‘sufficiently stamped with the purpose’ of implementing the treaty;
- Whether the additional prohibition is an improper way of ensuring strict obedience of the treaty rules.

#### C. INTERNATIONAL RECOMMENDATIONS

Court in **Industrial Relations Act Case** seemed to affirm that a **mere recommendation**, except insofar as it offers a guide to the suitable implementation of a treaty, will not be sufficient to support legislation under s 51(xxix).

**However, Pape** appears to suggest that laws enacted in accordance with an international recommendation might be supported under s 51(xxix) if it **effectively gave rise to an obligation**, or at least had the kind of **precise and specific focus** required for treaty obligations.

## 6. INCONSISTENCY – s 109

➤ Consider if there's an **immunities** issue first (topic 14): If the Cth had no power to make the law, then the law is invalid, rather than merely inconsistent under s 109.

### A. APPLIES TO LAWS

s 109 applies to 'laws':

- Legislation
- Subordinate legislation (such as regulations)
- Commonwealth industrial awards.
- **BUT NOT administrative orders issued under Cth regulations or common law.**

Before s 109 applies, there **must be two valid laws: (Egg Marketing Board)**

- Consider whether the Commonwealth law is valid (eg, is there a head of power; does it breach other constitutional limitations expressed or implied?)
- Is the State law valid? If so, only then do you consider inconsistency.

s 109 **does not apply** to conflicts between:

- ✗ Territory and Cth laws
- ✗ Laws of different states or territories
- ✗ The Constitution and a state law (the state law is invalidated by covering clause 5)

HCA has never directly considered what happens when **two state laws conflict**.

- Courts usually resolve by statutory interpretation – they just interpret each state's laws restrictively (read down) so they don't conflict, so they can avoid having to make a constitutional decision.
- Australia Acts gives states power to make laws relating to other states, but it's subject to Constitution, which likely stop states trying to restrict and control each other.

### B. INOPERATIVE NOT INVALID

A State law is **only invalid to the extent of any inconsistency**.

- The inconsistent part may be interpreted narrowly or read down so that it is not inconsistent with the Commonwealth law
- Where the rest of the State law is not directly inconsistent with the Cth law (and the Cth has not covered the field), the rest of the State law will continue to apply validly.

If the **inconsistency is removed**, the state law takes full effect again:

- Cth Soldier Re-Employment Act expired 10 years after WWII, state law became fully operational again (**Butler v AG Vic (1961)**).
- Throughout the period of its inconsistency, **the state law was valid, just inoperative**.
- Affirmed in **Native Title Act Case (1995)**

### C. TESTS OF INCONSISTENCY

The tests **tend to overlap** and are **not rigid**. (**Ansett v Wardley (1980)**)

Trend in HCA is not to look too rigidly at the tests, instead apply Dixon J's words from **The Kakariki (1937)**:

(1) "When a state law, if valid, would **alter, impair or detract from the operation of a law** of the Commonwealth Parliament, then to that extent it is invalid."

(2) "Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent." [**covering the field**]

This was quoted with approval in **Telstra v Worthing (1997)**, **Dickson v The Queen (2010)** and **Jemena (2011)**.

Court in **Jemena** added that there must be a 'real conflict' in that any alteration or impairment of, or detraction from, Commonwealth law '**must be significant and not trivial**'. Kirby J in **APLA** commented on the Court's recognition of the danger of overrefining principles in such tests.

But, Court in **Jemena** conceded the '**utility of the accepted test of inconsistency.. is well established**'.

**Consider the below tests with Dixon J's words 'alter, impair or detract' from The Kakariki in mind.**

Additionally, a **finding of 'no inconsistency'** under s 109 will **depend on all three tests (Fuller (1986))**

### 1. DIRECT: IMPOSSIBILITY OF OBEDIENCE

**Logical impossibility**: one law requires that you must do X, the other that you must not do X.

Example in **Daniell (1920)** where a State referendum on liquor trading hours was fixed by a State law for the same day as a federal Senate election.

Threat of being charged with offence an offence that carried a fine (for not erecting antennae) was not seen as requiring disobedience of a relevant state law, so there was no impossibility of obedience (**Fuller**)

#### Inconsistency

**s 109**: When a law of a State is inconsistent with a law of the Cth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

## 2. DIRECT: DENIAL OF RIGHTS

One law purports to **confer a legal right, privilege or entitlement**, the other law purports to take it away or diminish. One law says you can, other says you can't.

Example in **Bradley Brothers (1943)** women could be employed to work on certain machines, but state provision made it an offence. It was possible to obey both laws, but doing so required sacrifice of a right.

**Clyde Engineering (1926)**: Inconsistency exists and a State law will be held inoperative to the extent of that inconsistency when compliance with both the State and Commonwealth laws is possible, but obedience takes away a right conferred by the other statute.

Licence condition **requiring** the company to erect the two antennae was construed as stopping short of giving an **authority** to do so; hence there was no inconsistency under the 'denial of rights' test. (**Fuller**)

## 3. INDIRECT: COVERING THE FIELD

Has the Cth law **evinced a legislative intention (express or implied) to 'cover the field'** in which a state law also operates?

If two laws operate for different purposes (e.g. technical requirements of broadcasting and environmental concerns) there will be no intention cover the field (**Fuller**)

a) Is the Cth law **so detailed** that it is clearly intended to cover the entire subject to the exclusion of State laws? (**Noarlunga Meat**)

**Elaborately detailed laws** indicate Cth is intending to cover the field to the exclusion of state laws.

*"Power of the Cth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export."*

b) Would the **purpose of the Cth law be undermined** by the application of the state law? (**Goulden (1986)**)

Inconsistency with insurance laws and anti-discrimination laws. Men charged more than women for insurance premiums.

Distinguished **Wardley** (female Ansett pilot), because Cth law directed that prudential management of life insurance includes assessment of actuarial risk, therefore it was intended it would be outside normal AD laws. Accepted that running an insurance business required risk assessment, which involved a level of discrimination.

State law would '**alter, impair or detract**' from the operation of the Commonwealth law.

c) State law must have a **significant impact** of precluding, overriding or rendering ineffective the Commonwealth law (**APLA**)

A slight or marginal or insignificant impact of a State law upon a federal law will not give rise to a constitutional inconsistency (Callinan J, **APLA**).

The federal legislation would have 'needed to depend for its efficacy upon the unrestricted promotion of legal services' for the state law to be inconsistent (Gleeson CJ and Heydon J, **APLA**).

d) No inconsistency until a **decision or order is made** (unless field's covered) (**Mining Act Case**)

Cth law perimeter around a live shooting area overlapping with state mining lease area. Where a federal law allows a Minister to make a decision or order which may be directly inconsistent with a State law, the state law is only invalid when the decision is made and while it's in effect.

On this basis, two laws might be able to operate effectively in parallel, until a decision is made under the Cth law, rendering the State law inoperative to the extent of the inconsistency created. This only applies to direct inconsistency, **not indirect inconsistency**. State law would be permanently invalid in indirect inconsistency.

## e) Manufacturing inconsistency

Commonwealth **cannot legislate to prohibit states** from enacting a law or to say the State has no power to enact a certain law.

However, leaving areas of a Cth law deliberately without regulation while also indicating state laws could not operate within the same subject matter (**leaving field empty**) is different from a bare attempt to exclude State laws from an area the Cth has not effectively dealt with (**Wenn**)

**Question to ask**: is it a law with respect to a subject matter within a Commonwealth head of power, or is it merely a law about the application of State laws, which is not a matter of Commonwealth power? (**West**)

Arguments about 'manufactured inconsistency' are likely to be **treated primarily as depending on characterisation of the subject matter**, rather than a law with respect to the legislative activities of States (**Second Airlines Case; Telstra v Worthing**)

If a Cth law on a certain subject matter does not **directly express its intention to exclude state legislation**, its intention to 'cover the field' could be misunderstood.

Legislation in **Botany Municipal Council** tried to specifically exclude environmental legislation, but did not indicate covering the field. No inconsistency was found.

However, **Work Choices Case** expressly left an area without regulation while also indicating specific state laws could not operate. An inconsistency was established here

**f) Manufacturing consistency (clearing field)**

Cth may provide that it doesn't intend to cover the field, allowing State laws, not inconsistent with Cth law, to operate (**Credit Tribunal**).

Such an indication cannot, however avoid or eliminate a case of direct inconsistency.

Where the question is whether the Cth law 'covers the field', a **provision for the concurrent operation of State laws** will be accepted as a clear indication that the Cth enactment is not intended to 'cover the field'

**Rollback mechanisms**

This drafting device states that the federal law operates only to the extent that it does not render State legislation inconsistent under s 109.

The presence of State legislation that cannot operate concurrently with the federal law triggers a clause that renders the federal law inoperative.

In **Viskauskas**, enactment of the Racial Discrimination Act as per CERD was seen as an intention to cover the field: otherwise states could enact an exception that contravened CERD.

One month later, Racial Discrimination Act was amended to make it clear it did not intend to exclude or limit state laws that further the object of CERD and were capable of operating concurrently. Tried to enact retrospectively.

In **Metwally** Court held Parliament could prospectively clear the field in this way, however they **could not retrospectively clear the field**.

*It is possible that fresh legislation that purports to retrospectively clear the field could be valid (combine Mason, Wilson and Dawson JJ in dissent who thought s 6A could 'revive' the NSW legislation with Murphy and Deane in the majority who thought fresh legislation could allow for retrospective clearing of the field).*

**g) Conflicting Cth and State criminal laws**

Commonwealth and State criminal laws may conflict. Usually happens in relation to drug laws.

- If the Cth law excludes from criminality actions that the State law renders criminal, then the State law will be invalid (**Dickson v The Queen (2010)**).
  - There must, however, be a **'real conflict'** in the sense that any alteration, impairment of or detraction from Commonwealth law must be 'significant and not trivial' (**Jemena**)
  - If the Commonwealth law evinces an intention not to cover the field and the **Cth law is less strict than the State** law in imposing criminal liability (i.e. it is easier to be convicted under the Cth law), then there is no conflict and the two can operate concurrently (**Momcilovic**).

**INCONSISTENCY CASES**

**Native Title Case:** WA tried to extinguish native title rights after Mabo and replace with statutory land usage rights.

**Ansett v Wardley:** Ansett refused to hire Deborah Wardley as a commercial pilot because she was female.

**The Kakariki:** Two steamships collided, one sank in 3 mins

**Telstra v Worthing:** State laws tried to impose annual charges on telecommunications companies, Cth law making them immune from state laws was valid under s 51(v).

**Dickson v The Queen:** State law re: conspiracy to steal quantity of cigarettes inconsistent with Cth law.

**Jemena:** State long service leave provisions not inconsistent with the Workplace Relations Act.

**APLA:** Personal injury lawyer ad restrictions in NSW.

**Fuller:** Coffs Harbour Cth radio licence required two antennae within a certain proximity, state environment laws were not inconsistent.

**Daniell:** State referendum on liquor trading hours was fixed by a State law for the same day as a federal Senate election. Cth law said couldn't be on the same day.

**Bradley Brothers:** Cth law said women could work on certain machines, state provision made it an offence.

**Clyde Engineering:** State award mandated a 44 hour working week, Cth award was 48. Tried to dock his pay.

**Noarlunga Meat:** State law required a licence to slaughter livestock, Cth law did not.

**Goulden:** Discrimination of men for insurance premiums.

**Mining Act Case:** State mining lease area overlapped with defence exclusion zone for live ammunition at certain times.

**Wenn:** Discharged servicemen to be given priority for govt jobs, differing definitions of 'discharged serviceman'.

**West:** Commonwealth public servant retirement pension taxed by state after receipt.

**Second Airlines Case:** Cth and state aviation licencing.

**Botany Municipal Council:** Third runway at Sydney airport, Cth tried to exclude state EIS laws.

**Work Choices Case:** Workplace Relations Act tried to limit or exclude state wards and workplace regulations.

**Credit Tribunal:** Could not be convicted under Cth Trade Practices Act as well as state equivalent, and vice versa.

**Viskauskas:** Three Aboriginal people refused hotel lodging due to race. Proceedings under both Cth and state anti-discrimination laws.

**Metwally:** Egyptian postgraduate student at Wollongong University claimed racial discrimination.

**Momcilovic:** Cth and state drug trafficking laws.